

CHRISTENSEN JAMES & MARTIN
7440 W. SAHARA AVE., LAS VEGAS, NEVADA 89117
PH: (702) 255-1718 § FAX: (702) 255-0871

CHRISTENSEN JAMES & MARTIN
KEVIN B. CHRISTENSEN, ESQ.
Nevada Bar No. 00175
EVAN L. JAMES, ESQ.
Nevada Bar No. 007760
LAURA J. WOLFF, ESQ.
Nevada Bar No. 006869
7440 W. Sahara Ave.
Las Vegas, NV 89117
(702) 255-1718
Attorneys for Plaintiffs

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

Painters Joint Committee, through its designated fiduciaries, John Smirk and Thomas Pfundstein; IUPAT Industry Pension Fund; Employee Painters Trust Health & Welfare Fund; Painters Vacation-Holiday Savings Fund; Painters Apprentice Training Trust Fund; Painters Industry Promotion Fund; Painters JCIP Fund; Painters Organizing Fund; and Painters Labor Management Contract Fund,

Plaintiffs,

v.

J.L. Wallco, Inc. dba Wallalternatives, a Nevada corporation; Genuine Quality Coatings, Inc., a Nevada Corporation; Sunrise Painting/RCH, Inc., a Nevada Corporation; Richard Rejan Nieto, individually and dba Genuine Quality Coatings, Inc.; Claudia Bammer aka Claudia Nieto, an individual; Richard Raoul (aka Rqoul) Nieto, an individual; Great American Insurance Company; John Does I-XX, inclusive; and Roe Entities I-XX, inclusive,

Defendants.

Case No. 10-cv-1385-JCM-PAL

OPPOSITION TO MOTION FOR SUMMARY JUDGMENT FILED BY GENUINE QUALITY COATINGS, INC.; SUNRISE PAINTING/RCH, INC.; RICHARD REJAN NIETO; CLAUDIA BAMMER; AND RICHARD RAOUL NIETO

and the joinder filed by

GREAT AMERICAN INSURANCE COMPANY

and

COUNTER MOTIONS FOR DISCOVERY AND AN ORDER AUTHORIZING DISCLOSURE OF LABOR AND WAGE INFORMATION

COME NOW, the Plaintiffs, Painters Joint Committee, through its fiduciaries, John Smirk and Thomas Pfundstein; IUPAT Industry Pension Fund; Employee Painters Trust Health & Welfare Fund; Painters Vacation-Holiday Savings Fund; Painters Apprentice Training Trust Fund; Painters Industry Promotion Fund; Painters JCIP Fund; Painters Organizing Fund and Painters Labor Management Contract Fund (collectively "Plaintiffs" or "Trust Funds") by and through their attorneys, Christensen James & Martin, and hereby oppose the Motion for

Summary Judgment and Joinder thereto filed by Genuine Quality Coatings, Inc.; Sunrise Painting/RCH, Inc.; Richard Rejan Nieto; Claudia Bammer; Richard Raoul Nieto; and Great American Insurance Company and file their Counter Motions to allow for discovery pursuant to FRCP 56(f) and for an Order authorizing disclosure of wage information from the State of Nevada.

DATED this 27th day of October, 2010.

CHRISTENSEN, JAMES & MARTIN

By: /s/ Evan L. James

KEVIN B. CHRISTENSEN, ESQ.

Nevada Bar No. 00175

EVAN L. JAMES, ESQ.

Nevada Bar No. 007760

LAURA J. WOLFF, ESQ.

Nevada Bar No. 006869

7440 W. Sahara Ave.

Las Vegas, NV 89117

(702) 255-1718

Attorneys for Plaintiffs

MEMORANDUM OF POINTS AND AUTHORITIES

I. PRELIMINARY STATEMENT AND LAW

“The purpose of invoking the summary judgment procedure is to ‘smoke out’ those facts [outside the record].” *Business Equipment Center, Ltd. v. DeJur-Amsco, Corp.*, 465 F.Supp. 775 783 (D.C. Cir. 1979). Since the Defendants have yet to file an answer, the only record is the Complaint and the Defendants’ Motion with supporting Affidavits. Apparently, the Defendants were so unimpressed with the Plaintiffs “ridiculous lawsuit”, (Affidavit of Richard Raul Nieto ¶ 45, herein after “Nieto Sr. Aff”), that they decided to “smoke out” some early facts by asserting unsupported *ipse dixit* statements before this Court.

The Latin term *ipse dixit* means someone asserts something is true simply because “[h]e himself said it;” i.e., it is true because I said it is true. BLACK’S LAW DICTIONARY (6th ed. 1990) at 828. The Defendants’ Motion and supporting Affidavits are primarily based upon *ipse dixit* statements.

For example, Defendants’ Motion states, “Esquivel was exclusively in charge of the direction of Wallalternative employees.” (Motion at 5:8.) This statement is expressly contrary to a

1 written agreement between Joseph Esquivel (“Joseph” or “Esquivel”) and Richard Roul Nieto
 2 (“Nieto Sr.”) that states Nieto Sr. “**will manage** the painting operations of the company . . . and
 3 Claudia Nieto [aka Claudia Bammer] will manage the faux finish jobs.” (See Ex. 1-A ¶ 5,
 4 attached to Joe Esquivel Affidavit, hereafter “Esq. Aff.”)(emphasis added)

5 While FRCP 56(b) allows the Defendants to bring their Motion, it also allows parties
 6 time to conduct discovery pursuant to subpart (f). In the present situation, the Defendants claim
 7 not to be alter egos of one another, but there is ample documentary and testimonial evidence
 8 showing that the Defendants are indeed alter egos. Caution dictates that discovery should be had,
 9 because the Trust Funds need to obtain information necessary to calculate damages. Therefore,
 10 the Court is moved to allow for discovery and the likely filing of a counter motion for summary
 11 judgment through a supplemental pleading.

12 **II. FACTS**

13 J.L. Wallco, Inc. dba Wallternatives (“Wallternatives” or “Wallco”) was formed on
 14 October 16, 2003. Wallternatives did painting and wallcovering work in Clark County, Nevada
 15 and the surrounding areas. (Esq. Aff. ¶ 1.) Initially, Esquivel was the only officer and director of
 16 the corporation and was a non-union employer for almost three years. (Id. ¶ 4 .) In 2005, Nieto
 17 Sr. began working as an estimator for Wallternatives. He also worked as an estimator for several
 18 other companies. (Id. ¶ 5.) On June 15, 2005, Esquivel and Nieto Sr. executed a Management
 19 Contract whereby Nieto Sr. became a 50% owner and operator of Wallternatives. (Id. ¶ 6, *see*
 20 *also* Ex.1-A ¶1.)

21 The Management Contract vests certain management responsibilities in Nieto Sr. and his
 22 wife Bammer. The document states that, “Nieto wishes to become **co-owner and operator**. . . .”
 23 (Id. ¶ 2) and that “[i]t is intended that **Nieto [Sr.] will manage** the painting operations of the
 24 company . . . and Claudia Nieto **will manage** the faux finish jobs. (Id. ¶ 5)(emphasis added.) The
 25 Management Contract also states that “Esquivel has already been approved by the State
 26 Contractors Board and the appropriate unions to act as a union contractor in the State of
 27 Nevada.” (Id.) However, the Management Agreement does not state that Wallternatives was
 28 actually a union signatory at that time.

1 Wallalternatives became a union signatory at the insistence of Nieto Sr. who wanted to bid
2 work on the Las Vegas Strip. (Id. ¶ 10.) Wallalternatives did not become a union signatory until
3 July 11, 2006, more than a year after the Management Agreement had been executed. Nieto Sr.
4 wanted to be a union signatory, but Esquivel executed the Shop Card, because Nieto Sr. refused
5 to execute any union documents. (Id. ¶ 11; *see also* Ex. 1-B)

6 During 2008 and 2009, business was slow for Wallalternatives as well as the entire painting
7 and taping industry. Nieto Sr.'s personality and Esquivel's reliance on his representations
8 allowed Nieto Sr. to slowly squeeze Esquivel out of Wallalternatives' management decisions.
9 Nieto Sr. took over Wallalternatives and became the person in charge. (Id. at ¶ 13.)

10 Wallalternatives failed to pay contributions to the Trust Funds for covered work as required
11 by the Collective Bargaining Agreement. (Esq. Aff. ¶ 15.) On August 14, 2007, the Trust Funds
12 initiated litigation in this Court as Case No. CV-S-07-01079-PMP-PAL to recover contributions
13 and other damages. On March 28, 2008, Esquivel executed an Amended Stipulation for Entry of
14 Judgment by Confession on behalf of Wallalternatives [Docket No. 14]. On that same date, Nieto
15 Sr. was added as a Defendant and served with the Summons and Complaint. Thereafter, multiple
16 orders, including this Court's Permanent Injunction, were entered in favor of the Trust Funds and
17 against Wallalternatives. The Trust Funds proceeded with collection activities against
18 Wallalternatives through July 20, 2010. (*See* Ex. 2 ¶ 13, herein after "James Aff.")

19 On or about January 31, 2010, Wallalternatives allowed its Contractor's License to expire.
20 (Esq. Aff. ¶ 17.) In October 2009, Nieto Sr., Nieto Jr. and Bammer incorporated Genuine
21 Quality Coatings ("GQC"). (*See* Mot. Ex. 2, Affidavit of Richard Rejan Nieto ¶¶ 3-4, hereafter
22 "Nieto Jr. Aff.") Nieto Sr. is the father of Nieto Jr. and the husband of Bammer, making her
23 Nieto Jr.'s stepmother. Nieto Jr. was only about 22 years old when GQC was incorporated.
24 (Esq. Aff. ¶ 18.)

25 On November 20, 2009, Wallalternatives entered into a contract with APCO Construction
26 ("APCO") for work on the Las Vegas Museum ("Museum Project"). (*See* Affidavit of Joe Pelan
27 Ex. 3 ¶ 3, hereinafter "Pelan Aff.") The Museum Project was a Public Works Project which
28 required prevailing wages, the submittal of Certified Payrolls and the use of Union

1 subcontractors. (Id. ¶4.) Nieto, Sr. executed the subcontract on behalf of Wallternatives and
 2 represented himself as being one of the owners of Wallternatives with the authority to do
 3 business and execute contracts on the company's behalf. (Id. ¶¶ 5-6.)

4 The Nieto's formed GQC to try and avoid their obligations with the Union. (Esq. Aff. ¶
 5 20.) On February 18, 2010, Nieto Sr. sent an email to APCO seeking to transfer Wallternatives'
 6 contract to GQC. (Affidavit of Brian D. Benson Ex.¶¶ 3-4, herein after "Benson Aff."). Nieto
 7 Sr. stated in the email:

8 **we have formed a new company Genuine Quality Coatings, I am**
 9 **one of the partners and owner . . . we wanted to end our**
 10 **relationship with the union since Wallternatives is signatory . . .**
 11 **we would prefer to take over the contract from Wallternatives**
 12 **since it is the same owners, and not have to deal with the union,**
 13 **thanks, Richard.**

14 (Benson Aff. ¶ 4; *see also* Ex. A-4.) Nieto Sr. expressly claimed to be GQC's "**partner and**
 15 **owner**" and that Wallternatives and GQC has "**the same owners.**" He further asserted that GQC
 16 was expressly created so that Wallternatives' owners would "**not have to deal with the union.**"
 17 (Id.)(emphasis added.) This statement made by Nieto, Sr. is substantial evidence that should on
 18 its own preclude summary judgment for the Defendants.

19 On December 28, 2009, Nieto, Sr. executed a contract on behalf of Wallternatives with
 20 Western States Contracting for \$38,000.00. (James Aff. Ex. 2-D.) The contract, like the APCO
 21 contract, was for a public works project in which promises were made and accepted regarding
 22 labor on behalf of Wallternatives.

23 GQC and Wallternatives' work was the same, requiring the same type of contractors
 24 license. (Esq. Aff.¶ 21.) Two of GQC's contractors license classifications are for C-4A-Painting
 25 and C-4B-Wallcovering. (Id.; *see also* Ex. 1-C.) Wallternatives contractors license was likewise
 26 for C-4A Painting and C-4B Wallcovering. (Id.; *see also* Ex. 1-D.) Sunrise Painting/RCH, Inc.
 27 ("Sunrise") also was performing work that required a C-4 Painting license. (James Aff. Ex. 2-A
 28 at 15-17.) In a subcontractor/supplier profile document, GQC listed its services as "painting,
 wallcovering" (Esq. Aff. Ex. 1-E.) Wallternatives and GQC had the same monetary licenses
 limit, the same bonding company and the same bonding agent. (Id. ¶¶ 25-26; *see also* Ex. 1-C

1 and 1-D.) GQC, like Wallternatives, has bid and performed public works projects. (Id. ¶ 27.)

2 In 2005, Nieto Sr. was criminally convicted for illegally using Sunrise Painting/RCH,
3 Inc.'s contractor's license to bid and perform contracts requiring a C-4 Painting license. (James
4 Aff. Exs. 2-A, 2-B and 2-C.) Nieto Sr. has continued to operate Sunrise as a painting company.
5 (Esq. Aff. ¶21.) He had the final say of all business and employment matters for Sunrise, GQC
6 and Wallternatives. He reviewed all contacts, did estimates and was generally in charge of all
7 three companies. (Esq. Aff. ¶ 28.)

8 Wallternatives, Sunrise and GQC appear to be financially intertwined in labor and
9 business. Attached to Esquivel's Affidavit as Exhibit 1-G are six check nos. 3711-3716 dated
10 August 29, 2009 from a banking account with the name Sunrise Painting/RCH, Inc. made
11 payable to several different individuals. (Esq. Aff. ¶ 31.) One of the Payees is Javier Reyes who
12 was a classified "Paper Hanger" for the Union at the time. (See Affidavit of Mike Dunham ¶ 4,
13 hereinafter "Dunham Aff.") Furthermore, attached to Esquivel's Affidavit as Exhibit 1-H is
14 check no. 4116 dated February 2, 2010 from a banking account with the name "Sunrise
15 Painting/RCH, Inc." and made payable to Harsch Investment Properties (Wallternatives'
16 Landlord). (Esq. Aff. ¶32.) Another example is four checks made payable to Sunrise from
17 Wallternatives and signed by Bammer in the total amount of \$40,128.55. (Esq. Aff. ¶ 33 Ex. 1-
18 I.) Esquivel never authorized the checks to be written nor does he know the purpose of the
19 payments. (Id.)

20 Wallternatives, Sunrise and GQC shared and jointly paid for office space and
21 warehouse/production facilities at 7340 Eastgate Road, Suite 160, Henderson, Nevada
22 ("Offices"). (Esq. Aff. ¶ 35.) The Offices were leased to Wallternatives by Harsch Investment
23 Properties - Nevada, LLC ("Landlord"). Esquivel is listed on the Lease Agreement as
24 Wallternatives' President and Nieto Sr. is listed on the Lease Agreement as Wallternatives'
25 Director (just like he is listed with GQC). (Esq. Aff. ¶ 34; *see also* Ex. 1-J.) The Offices
26 consisted of four individual offices totaling 1,576 square feet and warehouse space totaling 2,823
27 square feet with a 45 foot loading dock. (See Ex. 1-J at 1.) No other tenants or subtenants appear
28 on the Lease Agreement.

1 Rent for the joint Offices was paid by all three entities. (Esq. Aff. ¶ 37.) On January 1,
 2 2010, Bammer signed a check made payable to the Landlord from Sunrise in the amount of
 3 \$2,772.00. (See Ex. 1-K.) On November 1, 2009, Bammer signed a check made payable to the
 4 Landlord from GQC in the amount of \$600.00. (See Ex. 1-L.) On July 1, 2009, Nieto Sr. signed
 5 a check made payable to the Landlord from Wallternatives in the amount of \$2,172.00. (See Ex.
 6 1-O.)

7 Equipment, materials and supplies for Wallternatives, GQC and Sunrise was collectively
 8 stored in the Offices. (Esq. Aff. ¶ 43.) The materials and supplies were commingled among the
 9 companies and each company would use the other companies equipment. (Id.) A picture taken
 10 in 2009 shows materials marked as “RCH (of Sunrise/RCH) in the Offices. (See Ex. 1-P.)¹ There
 11 are additional pictures showing materials and supplies used by Wallternatives, Sunrise and GQC.
 12 (See Ex. 1-Q.)

13 In February 2010, Esquivel was locked out of the Offices. Thereafter, he was able to
 14 remove some of his personal equipment, but could not retrieve any of Wallternatives’ equipment.
 15 (Esq. Aff. ¶ 62-63.) In fact, when he attempted to remove some of Wallternatives’ equipment,
 16 Nieto Sr. objected and stated, “GQC is using the equipment and you are not taking it and there is
 17 nothing you can do about it.” (Id.)

18 GQC used Wallternatives supplier accounts for its own projects, including accounts with
 19 Pape’ Material Handling (“Pape”), Dunn-Edwards Paints (“Dunn-Edwards”) and Garret
 20 Materials ProBuild (“ProBuild”). (Esq. Aff. ¶ 47.) Susan McCarver of ProBuild has testified
 21 that either Nieto Sr. or Nieto Jr. ordered materials for GQC on Wallternatives’ account.
 22 (Affidavit of Susan McCarver ¶ 3, hereinafter “McCarver Aff.”) In fact, the ProBuild account for
 23 Wallternatives was paid, at least in part, by a joint check from Valley Construction Services, Inc.
 24 made payable to GQC and ProBuild. (Id. ¶¶ 3-4; Ex. 6-A, 6-B.)

25 Similarly, ten of Wallternatives’ invoices attached to Esquivel’s Affidavit from Pape’
 26 were for materials used by or incorporated into GQC projects. (Esq. Aff. ¶; see also Ex. 1-R.)

27
 28 ¹ “RCH” is seen in white lettering on a crate in the lower left corner of the picture contained in Exhibit 1-P).

Also, several invoices from Dunn-Edwards list Wallternatives as the company that ordered material, but on the top of each document (as found) is a sticky note stating "G.C.C. Invoice." (Esq. Aff. ¶ 49; *see also* Exs. 1-S, 1-T.) These facts show that the sharing of supplier accounts was the normal procedure for operating the companies. (Esq. Aff. ¶ 51.)

The Offices shared by the companies were continuously used until sometime in October 2010 when they were abandoned by the Nietos, almost 18 months after the lease was first signed. (Esq. Aff. ¶ 64.) On October 11 and 12, 2010, Esquivel entered the Offices to investigate the premises after the abandonment. He was accompanied by the undersigned on October 12, 2010 for the purposes of preserving evidence. Documents were removed and retained by counsel (some of which are attached hereto as exhibits). Other items such as paint were left.

III. ARGUMENT

A. Alter-Ego Liability is Determined by Common Ownership, Management and Operations and Centralized Control of Labor Relations.

The Defendants are correct that the Court must first determine whether Wallternatives, GQC, and Sunrise are alter egos through an evaluation of 1) common ownership, 2) common management, 3) interrelations of operations, and 4) centralized control of labor relations. *UA Local 343 United Ass'n of Journeymen & Apprentices of Plumbing & Pipefitting Indus. of U.S. & Canada, AFL-CIO v. Nor-Cal Plumbing, Inc.*, 48 F.3d 1465, 1470 (9th Cir. 1994). "No factor is controlling and all need not be present" (*J.M. Tanka Const., Inc. v. N.L.R.B.*, 675 F.2d 1029, 1033 (9th Cir. 1982)) because the alter-ego doctrine is essentially one of equity to be determined by an evaluation of case facts. *McLaughlin v. L. Bloom Sons Co.*, 206 Cal.App.2d 848, 853 (Cal.App. First. Dist. Div. 2, Cal. 1962). Some relevant facts to consider in the alter ego analysis include "'substantially identical' management, business purpose, operations, equipment, customers, and supervision, as well as ownership.'" *Haley & Haley v. N.L.R.B.*, 880 F.2d 1147, 1150 (9th Cir. 1989) and *Dariano & Sons, Inc. v. District Counsel of Painters No. 33*, 869 F.2d 514, 518 (9th Cir. 1989).

However, the foregoing elements and factors are general rules in which no one element or fact will be dispositive because "[t]he focus of the alter ego test . . . is on the existence of a

1 disguised continuance of the same or an attempt to avoid the obligations of a collective
 2 bargaining agreement through a sham transaction or a technical change in operations.” *N.L.R.B.*
 3 *v. O’Neill*, 965 F.2d 1522, 1529 (9th Cir. 1992)(quoting *Haley*, 880 F.2d 1147, 49-50 (9th Cir.
 4 1989)).

5 Since the alter ego doctrine is an equitable doctrine, “[a] guiding concept is the need for
 6 the court to avoid an over-rigid preoccupation with questions of structure and apply the
 7 preexisting and overarching principle that liability is imposed to reach an equitable result.”
 8 *Litchfield Asset Mgt. Corp. v. Howell*, 799 A.2d 298, 312 (Conn. App. 2002). This is particularly
 9 true where the cause of action involves a federal question. *See e.g., SEC v. Elmas Trading Corp.*,
 10 620 F.Supp. 231 (D.Nev. 1985), aff’d, 805 F.2d 1039 (9th Cir. 1986). Federal analysis gives less
 11 respect to the corporate form than does the strict common-law alter ego doctrine. *Id.* “Courts
 12 have without difficulty disregarded corporate form for substance where ERISA’s effectiveness
 13 would otherwise be undermined.” *Lowen v. Tower Asset Management, Inc.*, 829 F.2d 1209, 1220
 14 (2nd Cir. 1987) (citing *Alman v. Danin*, 801 F.2d 1 (1st Cir. 1986)). The alter ego doctrine,
 15 which is remedial in nature, is not applied to eliminate the consequences of company operations,
 16 but to avoid inequitable results. *Elmas Trading Corp.*, 620 F.Supp. 231.

17 B. Fraud is Not a Necessary Element in an Alter-Ego Case.

18 The Defendants’ argument that “fraud or misrepresentation” must also be proven as an
 19 element to succeed on an alter-ego claim is not fully developed because “the determination that
 20 one entity is merely another’s alter ego will depend to some extent on whether or not the transfer
 21 of assets or the dissolution of the old entity is motivated by union animus.” *Haley*, at 1150.
 22 While discrete instances of fraud may exist, they are not necessarily required because the entire
 23 process of seeking to avoid a union obligation as evidence by animus and the elements and
 24 factors set forth above actually constitute the fraud in labor associated alter-ego cases. Thus, all
 25 of the traditional elements of fraud, such as intent, do not necessarily have to be present in order
 26 for the Court to find alter-ego. *J.M. Tanka*, at 1033, *See also, Stardyne, Inc. v. N.L.R.B.*, 41F.3d
 27 141, 141 n.4 (3rd Cir. 1994)(noting, “The Second, Fifth, Sixth, Seventh, Ninth, and District of
 28 Columbia Circuits have held that intent is not essential to the imposition of alter ego liability, but

1 is a factor that the Board may take into consideration.”).

2 When fraud is considered, it may be inferred from other facts.

3 Although alter ego is characterized as a finding of fact, it represents
4 the court's ultimate conclusion that contractual obligations will be
5 imposed upon a non-signatory employer. Because there is generally
6 little direct evidence of an employer's motive or intent, we evaluate
7 the court's findings and conclusions on the basis of inferences that
8 may be drawn from its predicate factual findings. Where evidence
9 suffices to support an inference that the non-signatory company was
10 formed to avoid a labor agreement, the alter ego finding will be
11 upheld.

12 *Trustees of the Operating Engineers Pension Trust Fund v. G.C. Wallace*, 895 F.2d 154 (9th Cir.
13 1988), 1988 WL 9778 *2 (C.A. 9 (Nev.)).

14 C. Specific and Genuine Issues of Fact Show that GOC, Sunrise and Wallalternatives
15 had Common Ownership, Management, Operations and Labor Relations.

16 1. *Sunrise is an Active Company.*

17 In his Affidavit Nieto Sr. claims that except for a few investments Sunrise is inactive so
18 commonality does not apply. However, the evidence shows that Sunrise has been actively doing
19 business for years. Exhibit 1-G contains six checks, nos. 3711-3716, dated August 29, 2009
20 from a banking account with the name Sunrise Painting/RCH, Inc. The checks are made payable
21 to several different individuals for what is believed to be labor. Furthermore, Exhibit 1-H
22 contains Sunrise check no. 4116 dated February 2, 2010 made payable to Harsch Investment
23 Properties for rent. Perhaps most difficult for the Defendants is the fact that in 2005 and 2006
24 Sunrise was implicated with Nieto Sr. for doing business without a contractors license or for
25 improperly allowing the use of a contractors license. (Ex. 2-A through 2-C.) Therefore, it is
26 unequivocal that Sunrise was and has been doing business in Clark County, Nevada for several
27 years.

28 The likely reason that Nieto Sr. refutes using Sunrise is because he was criminally
convicted in 2005 for illegally using Sunrise Painting Company's contractors license. Nieto Sr.
used or collaborated for the improper use of the company's contractors license by operating
under Sunrise/RCH. Thus, Sunrise's ability to be a licensed contractor pursuant to NRS 624 et

1 seq. was tainted, making the obtaining of a contractors license unlikely due to NRS 624.260 and
 2 NRS 624.265 because he had been convicted (twice) of “(a) [c]ommitt[ing] an act which would
 3 be grounds for the denial, suspension or revocation of a constructor’s license;” had “(b) A bad
 4 reputation for honesty and integrity;” and “(c) **Entered a plea of guilty . . . in this State or any
 5 other jurisdiction, of a crime arising out of, in connection with or related to the activities of
 6 such person in such a manner as to demonstrate his or her unfitness to act as a contractor. .**
 7 . .” NRS 624.265(1). Indeed, another conviction of Nieto Sr. for acting without a contractor’s
 8 license pursuant to NRS 624.700 would result in a category E felony punishable by a minimum
 9 one year prison term and a \$5,000.00 to \$10,000.00 fine. NRS 624.750(2)(c).

10 2. *Common Ownership exists because Wallternatives, GQC and Sunrise*
 11 *were dominated by members of the same family.*

12 Ownership interests of family members in different companies is treated as common
 13 ownership for single employer or alter-ego purposes. *J.M. Tanka Const., Inc.*, at 1034 (reading,
 14 “[A]ll the J.M. Tanka owners are members of the same family, and Tanka clearly dominated both
 15 corporations.”). Common ownership between alter-ego’s may occur where a parent and child
 16 own interest in the two differently named entities. *Bryer Construction Co.*, 240 NLRB 102, 104
 17 (1979). All of the Defendants’ Affidavits are from the same family. Nieto Sr. is the father of
 18 Nieto Jr. and the husband of Bammer. Bammer is Nieto Jr.’s stepmother. Nieto Sr. admits to
 19 being a managing member of each of the entities. Bammer and Nieto Jr. are listed as the
 20 Officers and Directors of GQC. Nieto Sr. admits to being the owner of Sunrise and is listed as an
 21 Officer and Director of Wallternatives. Nieto Jr. was only 22 years old when he incorporated
 22 GQC at about the same time that the Trust Funds won a lawsuit against Wallternatives for unpaid
 23 health care and pension contributions.

24 In *J.M. Tanka*, the union threatened in August of 1978 to pull its workers off of J.M.
 25 Tanka, Inc.’s jobs because the contractor owed fringe benefit contributions to its trust funds.
 26 That same month, R.M. Tanka, a construction company, was incorporated with owners and
 27 family members of J.M. Tanka taking primary ownership and control of the company. The court
 28 upheld an N.L.R.B. ruling finding that J.M. Tanka and R.M. Tanka were alter-ego’s of one

1 another, in part, because the companies were owned by the same family. Like *J.M. Tanka*,
2 corporate ownership of Wallternatives, GQC and Sunrise is held by the same family.

3 Indeed, *J.M. Tanka* and the present Case are extremely similar. GQC, like R.M. Tanka,
4 was incorporated when Wallternatives, like J.M. Tanka, was incurring liability for not paying
5 employee benefit contributions to trust funds. Both cases involve similar facts surrounding
6 family members who sought to avoid a collective bargaining agreement in an effort to reduce
7 labor expenses. In his email to APCO, Nieto Sr. even admits that GQC was formed to avoid the
8 Union. (Benson Aff. Ex. 4-A) There is no question that common ownership exists between the
9 three companies.

10 i. *Nieto Sr. has ownership interests in Wallternatives, GQC and*
11 *Sunrise.*

12 In *Southern California Painters & Allied Trades, Dist. Council No. 36 v. Rodin & Co.*,
13 558 F.3d 1028, 1032 (9th Cir. 2009), the court reiterated the rule that part of the alter-ego
14 determination is based upon the degree of common ownership. As such, the alter-ego
15 determination is not necessarily based upon actual common ownership by one individual.

16 The Defendants have emphatically stated that Wallternatives, GQC and Sunrise have
17 different owners. The veracity of the Defendants' Affidavits and the accuracy of their argument
18 directly contradicts the real time, non-litigation, claim of joint ownership. Indeed the argument
19 that "Esquivel was the sole owner of Wallternatives; Richard was the sole owner of RCH
20 [Sunrise]; and Rich was the sole owner of GQC" (Mot. 8:3-5) is directly contrary to the express
21 representations made to contractors for the purpose of obtaining jobs. For the Defendants, joint
22 ownership of the companies is necessary to get jobs but must be abandoned to avoid liabilities.
23 The law does not allow such a position.

24 Nieto Sr.'s claim of ownership in Sunrise is well established by admissions in his
25 Affidavit. He is also the owner of Wallternatives as evidenced by the Management Contract.
26 (See Ex. 1-A). On February 18, 2010, he sent an email to APCO claiming to be a partner and
27 owner of GQC and that Wallternatives and GQC are owned by the same people. He specifically
28 stated that

1 we have formed a new company Genuine Quality Coatings, **I am one**
 2 **of the partners and owner** . . . we wanted to end our relationship
 3 with the union since Wallternatives is signatory . . . **we would prefer**
 4 **to take over the contract from Wallternatives since it is the same**
 5 **owners**, and not have to deal with the union, thanks, Richard.

6 (Benson Aff. Ex. 4-A)(emphasis added.) According to Esquivel, Nieto Sr. had the final say on
 7 all business and employment matters for Sunrise, GQC and Wallternatives. (Esq. Aff. ¶ 28.)

8 The veracity of the Defendants' Affidavits and the accuracy of their argument directly
 9 contradicts the real time, non-litigation, claim of joint ownership. Indeed, the argument that
 10 "Esquivel was the sole owner of Wallternatives; Richard was the sole owner of RCH [Sunrise];
 11 and Rick was the sole owner of GQC" (*See* Mot. 8:3-5)² is directly contrary to the express
 12 representations made to contractors for the purposes of obtaining jobs.

13 The statement made by Nieto Sr. to APCO Construction is substantial evidence **on its**
 14 **own** in favor of finding that the companies are indeed alter egos of one another.

15 3. *Common Management exists because Wallternatives, GQC and Sunrise*
 16 *were managed by Richard Sr., Richard Jr. and Bammer.*

17 Common management between entities occurs where the same or substantially the same
 18 individuals manage both entities. For at least one court, it is "compelling evidence of alter ego
 19 status" where the "members of the same family managed both entities." *Pugent Sound Elec.*
 20 *Workers Health and Welfare Trust v. Deno*, 94 Wash. App. 1053 (Wash.App. Div. 1, 1999),
 21 1999 WL 169513 ((Wash.App. Div. 1, 1999)).³ The N.L.R.B. and Ninth Circuit Court of
 22 Appeals have found common management where one company manager ordered supplies for
 23 another company, provided credit references for another company, and monitored operations of

23 ² Mr. Morris, Defendants' counsel, has always acted as a gentleman in the past with the
 24 undersigned. I am therefore lead to believe that the Defendants have not been truthful with their
 25 attorney and have not fully disclosed the full nature of their conduct. Nevertheless, in light of the
 26 evidence, it may be necessary to retract or revise certain arguments.

27 ³ The *Pugent Sound* court, in applying Federal law, expressly reversed a summary judgment
 28 decision in favor of the defendants and against the trust funds because "reasonable inferences,"
 considered in the nonmoving party's favor, existed that would allow a reasonable mind to
 conclude that an administrator of one company who also served as an employee of another
 company created a nexus, in addition with other facts, sufficient to find an alter-ego existence.

1 another company. *N.L.R.B. v. O'Neill*, 1929-30.⁴

2 Nieto Sr. was a manager of Wallternatives, GQC and Sunrise. Even as early as 2006,
3 Nieto Sr. was making management decisions by signing letters for the company. He had the final
4 say on project related matters, and his involvement with GQC was necessary because at 22-23
5 years old, Nieto Jr. lacked the experience and confidence necessary to conduct a painting
6 business.

7 Nieto Sr. continued to operate Wallternatives even after he claims Wallternatives's
8 principal, Esquivel, had abandoned the company. In Paragraphs 13 and 18 of his Affidavit, Nieto
9 Sr. asserts that "in November 2009 Esquivel emptied the office space of all Wallternatives'
10 belongings," "declared personal bankruptcy, and abandoned Wallternatives and its office space."
11 If so, then Nieto Sr. had to be Wallternatives's manager on December 28, 2009 when he executed
12 a \$38,500.00 contract on behalf of a company. In addition, Nieto Sr. had to be a Wallternatives
13 manager on February 23, 2010 and March 17, 2010 when he ordered in Wallternatives's name
14 and through Wallternatives's suppliers materials that were incorporated into GQC's Jiffy Lube
15 contracts. In addition, Nieto Sr. actively sought to move a Wallternatives contract that could not
16 be legally performed due to lack of a contractors license to GQC (the company in which he
17 claimed ownership) because the Defendants did "**not want to have to deal with the union.**"
18 Nieto Sr.'s managerial fingerprints are all over the Defendant companies and summary judgment
19 in favor of the Defendants is improper.

20 Bammer, like Nieto Sr., testified in Paragraph 35 of her Affidavit that Esquivel
21 abandoned Wallternatives in November 2009. In January and February 2010 she wrote
22 \$40,128.55 in checks directly from Wallternatives to Sunrise. According to her, Esquivel was
23 not around (because he did not return) so the fact that \$40,128.55 found its way from
24 Wallternatives to Sunrise indicates that she at least had the managerial ability to write checks on
25

26
27 ⁴ The court, when analyzing common management, stated in dicta, "This factor standing alone
28 would not seem to constitute substantial evidence that the businesses were alter egos."
Nevertheless, the case facts relating to common management were clearly factored into to the
overall determination

1 behalf of Wallternatives and perhaps accept them on behalf of Sunrise. She likewise “does
 2 GQC’s bookkeeping, paperwork, invoicing and the like” and her own testimony establishes that
 3 she “manage[s] payroll for GQC. Bammer, in an apparent managerial role, also wrote checks
 4 from Wallternatives, Sunrise and GQC to “Harsch Investment Properties NV LLC” to pay for the
 5 lease that was in Wallternatives’s name. And in what appears to be a direct contradiction to
 6 Paragraph 6 of Nieto Sr.’s Affidavit (claiming that Sunrise never had employees), she wrote at
 7 least six checks valued between \$52.00 and \$312.00 to Javier Reyes, Daniel Guerrero, Ruben
 8 Acevedo, Javier Murillo, Briana Ramos and Lorena Soto for what appears to be labor.⁵ It is also
 9 admitted by the Defendants that she was an employee of both Wallternatives and GQC. She also
 10 ordered materials through Wallternatives’ Accounts (*See* Ex. 1-V) and verified the correctness of
 11 labor performed on jobs. (*See* Ex. 1-U.) There can be no question that Bammer was performing
 12 managerial function for all three companies.

13 There is more than enough evidence to conclude that the companies were managed by the
 14 same people.

15 4. *Genuine and Specific Facts show that GQC, Sunrise and Wallternatives*
 16 *had an Interrelations of Operations.*

17 Like the other factors, there is no definitive rule defining interrelations of operations. The
 18 analysis is factual and ultimately applied in conjunction with the weight of each factor.
 19 However, no definitive rule does not mean that the Court is without guidance. One court has
 20 found “strong evidence of interrelations of operations” where two companies share (or assumed)
 21 office space, staff, production facilities, supply sources, supervisors, employees and attorneys.
 22 *See J.M. Tanaka Const., Inc.*, 675 F.2d 1029, 1035. In the present Case, Wallternatives, GQC
 23 and Sunrise shared operational costs by paying rent for the same premises, 7340 Eastgate #106.

24
 25 ⁵ Nieto Sr. testified in Paragraph 5 of his Affidavit that “Apart from a handful of investments in
 26 [Sunrise]’s name, I left [Sunrise] completely inactive.” He also testified in Paragraph 6,
 27 “[Sunrise] was never involved in any painting (or any other kind) of work” Question, if so, then
 28 why did Sunrise on August 29, 2009 pay \$312.00 to three people, \$351.00 to one person,
 \$252.00 to another person, and \$52.00 to another person? An obvious answer is that Nieto Sr.’s
 testimony is not true, but an implied explanation is that Sunrise was paying for painting labor
 given the fact one payee, Javier Reyes, was a member of the Union.

1 The Lease Agreement did not allow for Sunrise or GQC to utilize the Offices without the
 2 Landlord's "prior written consent." Wallternatives could not "(a) assign, transfer, . . . (d) sublet
 3 . . . or (f) permit the use of the Premises by any party other than the Tenant" (*See* Ex. 1-J at
 4 7 ¶ 10.1.) Written consent from the Landlord for Sunrise's and GQC's use of the Offices was
 5 never obtained. (*See* Esq. Aff. ¶37.) Therefore, as a factual and legal matter, Sunrise and GQC
 6 never had any legal right to possess or use the Offices, but the did so under Wallternatives' name.

7 According to Esquivel, Nieto Sr.'s business partner, Sunrise was indeed conducting a
 8 painting business out of Wallternatives' offices and facilities. (*See* Esq. Aff. ¶ 43, 45-46.) In
 9 fact, Sunrise paid \$2,772.00 to the Landlord for use of the Offices that were leased in
 10 Wallternatives' name. (*See* Ex. 1-K.) The concept that a picture is worth a thousand words is
 11 true. Exhibit 1-P shows Sunrise [RCH] material in the Offices shared with Wallternatives and
 12 GQC, a clear indication that Sunrise was intertwined with Wallternatives and GQC.

13 The evidence of interrelations of operations continues to mount in the fact that
 14 Wallternatives, like *J.M. Tanaka Const.*, utilized Wallternatives's supply sources. We currently
 15 know that GQC used Wallternatives' ProBuild account on March 30 and April 2, 2010 (months
 16 after the Defendants had testified that Esquivel abandoned Wallternatives); Wallternatives's
 17 Pape' account on March 17, 2010; and Wallternatives's Dun-Edwards account on November 2, 3
 18 and 4, 2009. In fact, invoice number 2071048369 (*See* Ex. 1-V, third page) was ordered by GQC
 19 admitted employee Chalis Garcia (*See* Mot. Ex. 2 ¶ 16; *see also* Esq. Aff. ¶¶ 56-57.), and GQC
 20 paid off some of Wallternatives' ProBuild account. (*See* Ex. 6.)

21 Another fact showing interrelated operations is that Sunrise and GQC had no legal right
 22 to use the Offices of Wallternatives. The Lease signed by Wallternatives required the Landlord's
 23 written permission for Sunrise's and GQC's use that was never obtained. According to the
 24 Defendants, GQC was operating out of the Offices and there is direct evidence in the form of a
 25 check that Sunrise paid rent for the Offices. The only legal way Sunrise and GQC could
 26 therefore operate in or out of the Offices is if they were in fact Wallternatives operating under a
 27 different name. There is no question that Wallternatives, Sunrise and GQC operated as one
 28 entity when convenient and beneficial.

1 Another point showing interrelated operations is the fact that Wallalternatives and GQC
 2 used the same bonding company, Great American Insurance Company and bonding agent,
 3 Valerie A. Aber. (Esq. Aff. ¶ 26.)

4 5. *There are ample facts showing Centralized Control of Labor Relations.*

5 Again, no bright line rule regarding labor control and relations exists. However, some
 6 courts have found that joint ownership and substantial control is enough. *See Westphal v. Catch*
 7 *Ball Prods. Corp.*, 953 F.Supp. 475, 479 (S.D.N.Y.1997). As shown above, there is ample
 8 evidence and statements evidencing common ownership and control.

9 The Wallalternatives Management Contract between Esquivel and Nieto Sr. proves that
 10 Nieto Sr. and Bammer had control over labor. Paragraph 5, the management section, states that
 11 “Nieto will manage the painting operations of the company” and that “Claudia Nieto [Bammer]
 12 will manage the faux finish jobs.” The agreement also proves that Nieto knew of and consented
 13 to union participation. It reads, “Esquivel has already been approved by the State Contractors
 14 Board and the appropriate unions to act as a union contractor in the State of Nevada.” As such,
 15 Nieto Sr., had the contractual express and sole right of managing labor relations for
 16 Wallalternatives’ painting operations.

17 Nieto Sr.’s right to control labor relations and control over labor relations is evidenced by
 18 two known contracts. First, Nieto Sr. signed a Wallalternatives contract with Western States
 19 Construction for “paint” work on “The Upper Las Vegas Wash Trail Phase 1” for the City of Las
 20 Vegas. Nieto Sr. promised Western States that “Wallalternatives agrees to furnish all tools,
 21 equipment, apparatus, facilities, **labor** and materials [for its scope of work].” (emphasis added).
 22 In addition, Nieto Sr. promised that Wallalternatives would “**comply with federal, state and local**
 23 **laws regarding to [sic] minimum wages, hiring and discrimination, including NRS 338.020**
 24 **through 338.090**” when completing its work on the project. In addition, Nieto Sr. acted on
 25 behalf of Wallalternatives by “insur[ing] that all their employees and lower tier subcontractors
 26 employees on the work are paid in accordance with the **2009 Prevailing Wage Rates for Clark**
 27 **Count, Nevada.**” (emphasis in original).
 28

1 NRS 338.035 is particularly instructive as to Nieto Sr.s' role in labor relations because he
 2 accepted on behalf of Wallternatives the right to discharge employee wages "by making
 3 contributions to third a person pursuant to a fund, plan or program in the name of the worker."
 4 The Plaintiffs are third person ERISA funds and plans established to accept contributions as
 5 wages⁶ for workers. There is no question that Nieto Sr. was making and accepting direct labor
 6 promises for Wallternatives.

7 Second, Nieto Sr. executed a Wallternatives contract with APCO for the City of Las
 8 Vegas Mob Museum. (*See* Ex. 3-A) Like the Western States contract, Nieto Sr. promised APCO
 9 that it would provide Wallternative's union labor to the project and that Wallternatives would be
 10 responsible for its "labor trouble" (Id. ¶ 6.7.) In fact, Nieto Sr. promised on behalf of
 11 Wallternatives that the company would "strictly comply with all applicable federal, state and
 12 local laws, rules, regulations, and ordinance," relating to labor, which includes compliance to
 13 ERISA and the duty to bargain in good faith (Id. ¶ 16.1) and that Wallternatives would pay and
 14 hold APCO harmless from any nonpayment of "contributions." (Id. ¶ 9.)

15 On February 18, 2010, Nieto Sr. sought to transfer the APCO contract to GQC for the
 16 sole purpose of avoiding labor relations with the union. He told Joe Pelan with APCO that "**we**
 17 **have formed a new company Genuine Quality Coatings . . . we wanted to end our**
 18 **relationship with the union since Wallternatives is signatory . . . we would prefer to take**
 19 **over the contract from Wallternatives . . . and not have to deal with the union,** thanks,
 20 Richard." (emphasis added). Nieto Sr.'s own words show that he controlled labor relations for
 21 QGC because he was refusing to deal with the union. In fact, Nieto Sr.'s email shows that he
 22 was making labor relation decisions for both Wallternatives and GQC by actively seeking to
 23 avoid the union despite the fact that he had executed a contract that required his company to
 24 comply with labor law, such as negotiating in good faith.

25 As the sole claimed owner of Sunrise, Nieto Sr. has to have had control over labor
 26 relations for the company. However, there is further evidence that Bammer signed a Sunrise
 27

28 ⁶ The Nevada Supreme Court defined contributions to the Trust Funds as wages. [citation].

1 check paying union member Javier Reyes \$312.00. Sunrise was therefore paying a union
 2 member for what implicitly looks like labor. As the claimed sole owner of Sunrise, Nieto Sr.
 3 would therefore had to have managerial control over hiring and firing union members.

4 Finally, Esquivel has testified that it was Nieto Sr.'s idea to become a union contractor.
 5 He also testified that labor decision were primarily made by Nieto Sr. The fact that the
 6 Defendants have produced self-serving affidavits with *ipse dixit* statements is not reason
 7 sufficient to enter summary judgment in the face of substantial unbiased documentation and
 8 testimony showing the existence of an alter-ego situation.

9 6. *Shame and Technical Change is apparent.*

10 The mountain of evidence already amassed against the Defendants establishes that the
 11 Nieto's were operating to avoid the union. Nieto Sr.'s email to that extent cannot be any clearer.
 12 GQC was established for the purpose of avoiding Wallalternatives' signatory obligations. There
 13 really is no question of fact when such statements come directly from a Defendant's mouth.

14 **IV. MOTION FOR ESD RECORDS**

15 The Plaintiffs now move the Court for its Order permitting them to obtain Quarterly
 16 Wage Reports from the Employment Security Division of the Department of Employment,
 17 Training and Rehabilitation for the State of Nevada ("ESD") for all of the Defendants.

18 Though confidentiality restrictions stated in NRS 612.265 generally preclude the ESD
 19 from providing the Quarterly Wage Reports to the Trust Funds, NRS 612.265(3)(a) provides an
 20 exception stating that "...the information obtained by the Division may be made available to: (a)
 21 Any agency of this or any other state or any federal agency charged with the administration or
 22 enforcement of laws relating to...labor..." ("Labor Exception").

23 Federal Law requires Employee Benefit Trust Funds, such as the Plaintiffs, to complete
 24 compliance audits of their contributing employers. *See Central States Pension Fund v. Central*
 25 *Transp., Inc.*, 472 U.S. 559, 574 (1985) (noting that the failure to systematically collect amounts
 26 properly owed by a contributing employer constitutes an improper extension of credit). 29
 27 U.S.C. §§1109 and 1132, specifically provide for civil actions such as the claims asserted by the
 28 Trust Funds in this action. These, and related claims, have historically been recognized both by

1 this Court and the courts of the State of Nevada as claims for “labor”. *See Trustees of the*
 2 *Constr. Indus. and Laborers Health and Welfare Trust v. Summit Landscape Companies, Inc.*,
 3 309 F.Supp.2d 1228, 1244 (D. Nev. 2004); and *see Tobler and Oliver Const. Co. v. Board of*
 4 *Trustees*, 84 Nev. 438, 443, 442 P.2d 904, 907 (1968).

5 Under the Labor Exception, the ESD may lawfully disclose the Defendants’ Quarterly
 6 Wage Reports upon receipt of this Court’s Order. That information may then be utilized for
 7 appropriate administration or enforcement of laws relating to labor, including the determination
 8 of liability undertaken by the Trust Funds, which will serve to liquidate the amount of damages
 9 claimed by the Trust Funds. Upon receiving such Orders in similar circumstances in the past, the
 10 ESD has provided Quarterly Wage Reports directly to counsel for the Trust Funds.

11 This particular motion is brought at this time for judicial economy. This Court has
 12 routinely granted such motions in the past.

13 **V. CONCLUSION**

14 There are many documented facts supporting the Plaintiffs’ Complaint. Indeed, the
 15 Plaintiffs have presented concrete evidence of alter ego while the Defendants primarily rely upon
 16 *ipse dixit* statements that are in fact contrary to documentary evidence and the testimony of
 17 disinterested third persons. The Defendants’ Motion should be denied, discovery should be
 18 ordered, and the Court should enter its order allowing for the recovery of ESD records.

19 Dated this 27th day of October, 2010.

20 CHRISTENSEN, JAMES & MARTIN

21 By: /s/ Evan L. James

22 KEVIN B. CHRISTENSEN, ESQ.

23 Nevada Bar No. 00175

24 EVAN L. JAMES, ESQ.

25 Nevada Bar No. 007760

26 LAURA J. WOLFF, ESQ.

27 Nevada Bar No. 006869

28 7440 W. Sahara Ave.

Las Vegas, NV 89117

(702) 255-1718

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I am an employee of Christensen James & Martin. On the date of filing of the foregoing papers with the Clerk of Court I caused a true and correct copy to be served in the following manner:

☒ ELECTRONIC SERVICE: Pursuant to Local Rule LR 5-4 of the United States District Court for the District of Nevada, the above-referenced document was electronically filed and served on all parties through the Notice of Electronic Filing automatically generated by the Court.

☒ UNITED STATES MAIL: By depositing a true and correct copy of the above-referenced document into the United States Mail with prepaid first-class postage, addressed to the parties at their last-known mailing address:

☐ OVERNIGHT COURIER: By depositing a true and correct copy of the above-referenced document for overnight delivery via a nationally-recognized courier, addressed to the parties listed on the attached service list at their last-known mailing address.

☐ FACSIMILE: By sending the above-referenced document via facsimile to those persons listed on the attached service list at the facsimile numbers set forth thereon.

CHRISTENSEN JAMES & MARTIN

By: /s/ Natalie Larson